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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 429

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Petitioner,*

v.

NORTHWEST AIRLINES, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. In arguing that this case does not present the broad problem of what law governs employment relations on American flag airplanes when flying outside the physical boundaries of the United States, the Brief in Opposition (p. 5) states that the case actually involves only the legality of a contract. This is not correct. This is a specialized proceeding under the

Railway Labor Act in which the courts are empowered to set aside the award of an arbitration board which does not conform to the substantive requirements of that Act. The district court found that the award here made was illegal if the Act was applicable (R. 196-197). The Court of Appeals accepted this finding. Since there has been no cross-petition filed here, this finding must be accepted as final. Thus the issue of the law applicable is squarely before this Court.

2. The repeated statements in the Brief in Opposition (pp. 6, 8, 9) that Congress in its enactment of the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C. 1301, *et seq.*) rejected the interpretation of the Railway Labor Act here advanced by petitioner, are contrary to the fact. In the House Report (H. Rept. 2360, 85th Cong., 2d Sess., pp. 10-11), in the debate on the floor of Congress (104 Cong. Rec. 16086), and in the Conference Report (H. Rept. 2556, 85th Cong., 2d Sess., p. 90), Congress expressed unequivocally that its reenactment without change of provisions of the Civil Aeronautics Act of 1938 was not to be used by courts as indicating any Congressional intent as to the meaning thereof. Thus, the Conference Report states (p. 90):

> "*Effect of reenactment of provisions of present law.* The committee of conference wishes to make it clear that it endorses, as expressing the intention of the managers on the part of the Senate and the managers on the part of the House, the statements in the House debate, and the House committee report to the effect that Congress does not intend that this reenactment of the Civil Aeronautics Act of 1938 shall constitute legislative adoption of administrative interpretations and practices or of judicial decisions under that act.

> It is important that there be no doubts on this point, particularly in view of the many legal controversies over the interpretation of the provisions of title IV. * * *
>
> "As stated in the report of the House Committee on this legislation, therefore, the reenactment of provisions now in effect is to be regarded as a completely neutral factor in any question arising hereafter as to the interpretation of the present law or of this new legislation."

Title IV of the Civil Aeronautics Act of 1938, to which the above quotation specifically refers, contained in Section 401 (*l*) (4) the requirement of compliance with the Air Carrier Amendment to the Railway Labor Act as a condition of every certificate of public convenience and necessity, and in this respect was reenacted without change in the Federal Aviation Act of 1958 (Section 401 (k) (4), 49 U.S.C.A. Supp. 1371 (k)(4)).

Nor are the proceedings in the 83rd Congress relied upon in the Brief in Opposition (pp. 8-9, 27-28) any part of the legislative history of the Federal Aviation Act of 1958. While the Senate Report (S. Rept. 1811, 85th Cong., 2d Sess., p. 7) and the House Report (H. Rept. 2360, 85th Cong., 2d Sess., pp. 2-3) on the bill which became the Federal Aviation Act of 1958, list certain bills and hearings in earlier Congresses as part of the consideration by Congress of the problem posed by the mid-air collisions in 1958, which necessitated the hurried adoption of a unified aviation system which included control of military as well as civil flights, none of the bills, reports and studies cited in the Brief in Opposition (pp. 8, 27-28) are mentioned in these reports.

S. 2647, 83rd Cong., 2d Sess., which is the bill cited in the Brief in Opposition (p. 8), contained only one provision to amend the Railway Labor Act, namely, Section 1201 (b) (1), which read as follows:

> "(1) Section 201 of the Railway Labor Act (U.S.C. 1940 edition, title 45, sec. 181), by amending such section to read as follows:
>
> "Section 201. All the provisions of Title I of this Act, except the provisions of Section 3 thereof, are extended to, and shall cover, every air carrier and air contractor, as those terms are defined in the Civil Aeronautics Act of 1944, and every person (including, but not by way of limitation, corporations, joint-stock associations, partnerships and unincorporated associations) which is directly or indirectly owned or controlled by one or more such carriers or contractors, including any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of such carrier, air contractor, or other person, and every person who performs any work as an employee or subordinate official of such carrier, such contractor, or such other person, and is subject to its continuing authority to supervise and direct the manner of rendition of his service, whether or not such work is in connection with air transportation or air commerce. The definition of the term 'employee' set forth in Section 1 of this Act shall not be applicable to this title."

The foregoing is the only language in S. 2647, 83rd Cong., 2d Sess., relating in any way to the issues here involved. That a committee of one of the branches of Congress did not approve this provision seems of no relevance.

Nor is there any thing in the quoted Aviation Study made in the 83rd Congress (Br. in Opp. pp. 27-28) directed to personnel working on American flag planes, as to whom American law would seem obviously applicable without any issue of extraterritoriality arising. Furthermore what certain Congressmen in 1955 think a law enacted in 1938 means cannot be considered its "legislative history." *New York* v. *Saper*, 336 U.S. 328, 339-340; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 317; *Wong Youg Sung* v. *McGrath*, 339 U.S. 33, 47.

3. The case of *Air Line Dispatchers Ass'n* v. *National Mediation Board*, D. C. Cir. 1951, 189 F. 2d 685, certiorari denied, 342 U.S. 849, upon which the Brief in Opposition (pp. 5, 7, 8) relies so heavily, is not an applicable precedent here because of the total dissimilarity of facts. There the Air Line Dispatchers Association had applied to the National Mediation Board for certification as the representative of flight dispatchers of a company which conducted no operations in the United States. The flight dispatchers performed their work entirely upon foreign soil, were not members of the crew of any airplane and did not perform any of their work upon or within any airplane. In these circumstances the National Mediation Board considered the Railway Labor Act inapplicable and dismissed the petition. The United States Court of Appeals for the District of Columbia Circuit upheld the National Mediation Board's dismissal as proper, saying (at pp. 687, 690):

> "The Company operates and the dispatchers are employed solely outside the continental limits of the United States.
>
> * * *

> "Turning to the merits of the decision made by the Board, we agree that the Act does not extend to an air carrier, and its employees located entirely outside the continental United States and its territories."

It is true that the opinion of the Court of Appeals in the *Air Line Dispatchers* case does reach the conclusion that the Railway Labor Act is limited in its application to the physical boundaries of the United States. The court, however, did not have before it and did not consider the application of the Act to crews performing all their services on board American flag airplanes. We believe the opinion in the *Air Line Dispatchers* case must be strictly limited to the facts of that case.

Except for the *Air Line Dispatchers* case we know of no instance in which the National Mediation Board has ever applied the doctrine enunciated by the courts below, that the Railway Labor Act has no application beyond the physical boundaries of the United States. The National Mediation Board has uniformly refused to apply rail coverage standards to airlines. *Matter of Representation of Northwest Airlines, Inc.—Mechanical Department Foremen*, 1948, 2 N.M.B. 19, 24-26.

An examination of the references cited by the Brief in Opposition (pp. 6-7) to show that it has not been the uniform practice to apply the Railway Labor Act to all pilots and engineers on American flag airplanes even when they are based or fly wholly outside the United States, establishes just the opposite. Various instances in which the National Mediation Board has applied the Railway Labor Act to disputes outside the physical boundaries of the United States are set forth in National Mediation Board, 16th Annual Re-

port, p. 53; 17th Annual Report pp. 14-15; 18th Annual Report, p. 44; 19th Annual Report pp. 43-44.

4. Contrary to the statement in the Brief in Opposition (p. 12), the Civil Aeronautics Act both by its terms, by regulations issued thereunder and by the uniform decisions construing it, is applicable to all flights by American flag airplanes no matter where in the world they take place. No American flag airplane may engage in commercial transportation anywhere in the world except under a certificate of public convenience and necessity issued by the Civil Aeronautics Board. Section 401 (a) and (e), 49 U.S.C.A. Supp. 1371 (a) and (e). Such certificates uniformly contain a provision, such as is present in the instant case (R. 115, 119), that the carrier shall not render service to any point abroad not included in a service plan approved by the Board. 14 C.F.R. 203.2 American citizens, even when they acquire title to a plane abroad, must register it. Section 501 (a) and (b), 49 U.S.C. 1401 (a) and (b). See *Miller v. United States*, Ct. Cl., 1956 140 F. Supp. 789, 791. C.A.B. safety regulations specifically apply to air transportation operations "between any two places outside the United States." 14 C.F.R. 41.0.

Neither *Lineas Aereas Costarricenses, S. A.*, 18 C.A.B. 552, 557-558 (1954) nor *Latin American Air Freight Case*, 16 C.A.B. 107, 160 (1952), stands for the proposition for which they are cited in the Brief in Opposition (p. 12). Lineas Aereas Costarricenses is a Costa Rican corporation (18 C.A.B. at p. 558, n. 9) The C.A.B. held that this foreign corporation was not required by our law to secure a permit from the United States to operate between points outside the United States, where it was not seeking any traffic rights be-

tween the United States and those points. Foreign corporations are not permitted to register their planes as American flag planes but rather must look to their home country for all rights not involving traffic within the United States.

In the *Latin American Air Freight Case*, 1952, 16 C.A.B. 107, the C.A.B. did not adopt the language of the Examiner to which the Brief in Opposition (p. 12) refers but expressly refused to grant a certificate to Aerovias Sud Americana (an American corporation —see 16 C.A.B. at p. 115) to move freight between Tegucigalpa, Honduras and Havana, Cuba on the ground that the public convenience and necessity would not be served thereby (16 C.A.B. at 115, 123).

The Brief in Opposition proceeds on the assumption that after a plane stops for fuel or to pick up or discharge passengers at a point outside the United States, its subsequent flight to other points outside the United States ceases to be commerce between the United States and a foreign country. The record here shows that all Northwest Airlines flights abroad are certificated as segments of flights to and from the United States (R. 114, 118). Northwest Airlines carries predominantly United States mail and United States citizens traveling to and from the United States on all of its flights (R. 51, 66, 67, 68-112). And under the Bermuda Agreement of 1946 and other bilateral treaties the United States has subscribed to the principle that international aviation should be devoted to building up of air carriage between the country of the nationality of the airplane and foreign points but not to building up of traffic between points outside the country of the nationality of the

airplane except to the extent of "fill-in" capacity. In other words, the United States has agreed that it will not permit American flag airplanes to build up air traffic between any two points outside the United States except to fill in unused seats or unused space arising as part of traffic to and from the United States. S. Rep. 1875, 84th Cong., 2d Sess., International Air Agreements, Report of Committee on Interstate and Foreign Commerce, United States Senate, pp. 7-10, 25; H. A. Wassenbergh, Post-War International Civil Aviation Policy and the Law of the Air, The Hague, Martinus Nijhoff, 1957, pp. 42-44, 53-61.

5. In arguing that the law of the flag does not apply to airplanes, the Brief in Opposition (pp. 15-16) ignores the fact that our Congress certainly assumed it did when it amended the Criminal Code to include within the term "special maritime and territorial jurisdiction of the United States", "any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." 66 Stat. 589, 18 U.S.C. 7, as amended July 12, 1952. Here all the flights of Northwest Airlines outside the United States are entirely over the high seas except when stopping at the islands of the Pacific or at Hong Kong or Seoul to take on fuel or discharge or pick up passengers or cargo.

We do not read *Regina* v. *Martin*, (1956) 2 All Eng. L. R. 86, relied upon Brief in Opposition (p. 15), as

rejecting the law of the flag. While the court found it unnecessary to pass on the point, the court's references to English statutes and its reasoning indicate acceptance of that principle in Great Britain.

6. Since the petition for a writ of certiorari was filed herein the need for a decision by this Court of the questions here presented has increased. While we did not call to this Court's attention pending litigation on this issue in the United States Court of Appeals for the Second Circuit because negotiations were then in process which we believed would make that case moot, the negotiations proved unsuccessful and indeed a strike has now been voted with one of the issues in dispute the failure of the airline to recognize and deal with the Air Line Stewards and Stewardesses Association as the representative of some fifty foreign nationals who have chosen the Association as their representative and beseeched it to adjust grievances on their behalf. This is the case of *Air Line Stewards and Stewardesses Association* v. *Trans World Airlines*, D. C. S. D. N. Y., 173 F. Supp. 369, on appeal to the United States Court of Appeals for the Second Circuit and set for argument on November 12, 1959.

Likewise, subsequent to the filing of the petition for a writ of certiorari herein, the Braniff Airways, Inc., has refused to bargain collectively with the Air Line Stewards and Stewardesses Association as the representative of thirty-four pursers and hostesses based outside the United States but each of whom flies into the United States and performs services on American flag airplanes while flying within the physical boundaries of the United States and while landed on United States soil. The union has filed suit to compel bargaining. *Air Line Stewards and Stewardesses Association*

v. *Braniff Airways, Inc.*, Civil No. 59C1662, United States District Court for the Northern District of Illinois, Eastern Division. In each the *TWA* case and the *Braniff* case the sole issue is the applicability of the Railway Labor Act to crews on airplanes flying in whole or in part beyond the physical boundaries of the United States.

Respectfully submitted,

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